

84-207

No. _____

Office Supreme Court, U.S.
FILED
JUL 23 1984
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1983

PASCUA YAQUI HOUSING AUTHORITY,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF ARIZONA,
In and For the County of Pima, the
Honorable James C. Carruth; and the
following real parties in interest:
TBI GENERAL CONTRACTORS, LTD., an
Arizona corporation, and MANDAN, INC.,
an Arizona corporation, collectively,
d/b/a MANDAN-TBI JOINT VENTURE, and
MTV GENERAL CONTRACTORS, INC., an
Arizona corporation,

Respondents.

Petition for a Writ of Certiorari
To the Arizona Supreme Court

LAW OFFICES OF DAVID G. EISENSTEIN, P.C.
By: David G. Eisenstein
(Attorney of Record)
Karen Morris Wiggum
Attorneys for Petitioner
695 West Ajo Way
Tucson, Arizona 85713

QUESTIONS PRESENTED FOR REVIEW:

1. Did the Arizona Supreme Court err in refusing to prohibit the state trial court from exercising jurisdiction over a contractual dispute between the Respondent general contractors and the Petitioner, PASCUA YAQUI HOUSING AUTHORITY which concerns the building of dwelling units on reservation lands?
2. Do Arizona state courts have jurisdiction over housing developments on Indian lands where a dispute arises between the housing development corporation formed by an Indian tribe pursuant to Department of Housing and Urban Development (HUD) regulations and an Indian owned general contractor hired to build the homes under the HUD-backed program?



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OPINIONS BELOW

The ruling of the trial court denying the Motion to Dismiss the Complaint of the Respondents real parties in interest is set forth in Appendix A to this Petition. The Order of the Arizona Court of Appeals dismissing the Petition for Special Action filed by the Petitioner herein, which Petition was in the nature of a petition for prohibition, is likewise set forth in Appendix A as is the Order of the Arizona Supreme Court denying review of the Order of the Court of Appeals. The Record of the Special Action proceedings has been certified by the Clerk of the Arizona Court of Appeals and has been filed with the Clerk of the United States Supreme Court along with this Petition. Citations to that record will be by numbered document according to the numbers assigned by the Clerk to each document.

JURISDICTION

The final judgment of the Supreme Court of Arizona in the form of an Order given April 24, 1984 (R. 12) denying review of the Arizona Court of Appeals' dismissal (R.6) of the Petition for Special Action (R.1) filed by the Petitioner herein constitutes a final judgment of the highest court of the State of Arizona with respect to the federal questions raised in the Special Action proceedings in the nature of the extraordinary writ of prohibition which had been requested to prevent the trial court from proceeding with a trial and exercising further jurisdiction over the case. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 43 L.Ed.2d 328, 95 S. Ct. 1029 (1975), Michigan Central Railroad Co. v. Mix, 278 U.S. 492, 73 L.Ed.2d 470, 49 S.Ct.207 , (1929), Madruga v. Superior Court of San Diego, 346 U.S. 556, 98 L.Ed. 290, 74 S.Ct. 298, (1954); Shaffer v. Heitner, 433 U.S. 186 , 53 L.Ed.2d 683,

97 S.Ct. 298 (1977. The jurisdiction of this Court is invoked under 28 USC Sec. 1257(3).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves:

1. 25 USC Sec. 1300(f)
2. 24 CFR Sections 805.101 et seq and 805.204.
3. Sections 1.1(b) and (e), Civil and Criminal Law and Order Code, Pascua Yaqui Tribe
4. Article XX, Para. 4, Arizona Constitution, and
5. Rule 12(b)1 and 2 of the Arizona Rules of Civil Procedure, Vol. 16 A.R.S.

The pertinent portions of those statutes are as follows: With respect to 25 USC Sec. 1300(f), paragraph (c) of the statute states in part:

... [T]hat the State of Arizona shall exercise criminal and civil jurisdiction over such lands as if it had assumed jurisdiction pursuant to the Act of August 15, 1963 (67 Stat. 588), as amended by the Act of April 11, 1968 (82 Stat. 79).



24 CFR Sec. 805.101(a) provides in pertinent part:

"(a). General. (1) Under the U.S. Housing Act of 1937 (42 USC 1437 et seq.), the U.S. Department of Housing and Urban Development provides financial and technical assistance to public housing agencies for the development and operation of low income housing projects. This part is applicable to such projects which are developed or operated by an Indian Housing Authority in the area within which such Indian Housing Authority is authorized to operate."

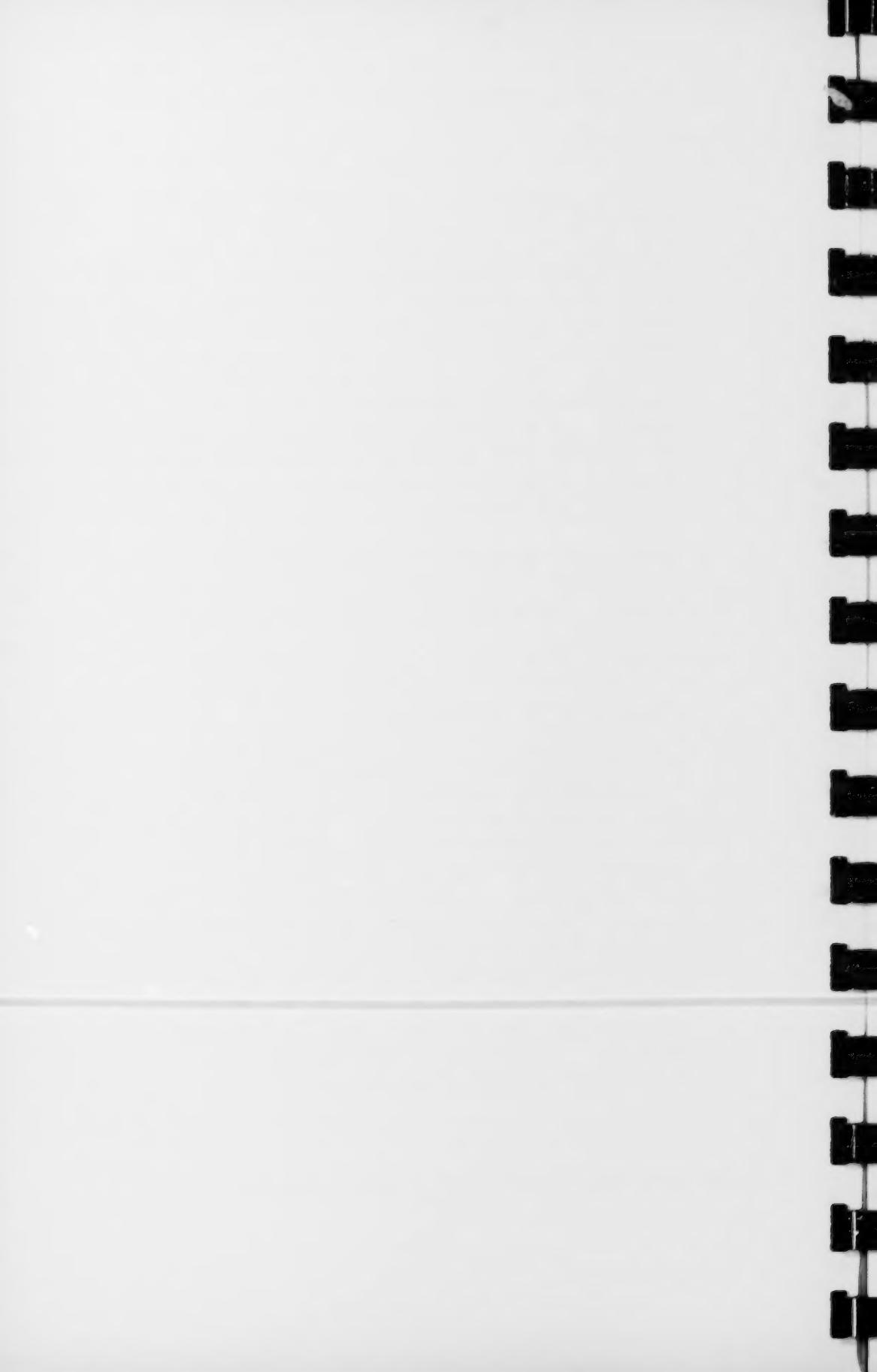
24 CFR Sec. 805.110, Appendix 1 - Tribal Ordinance, states in pertinent part as follows:

"Article V - Powers.

2. The Council hereby gives its irrevocable consent to allowing the Authority to sue and be sued in its corporate name, upon any contract, claim or obligation arising out of its activities under this ordinance and hereby authorizes the Authority to agree by contract to waive any immunity from suit which it might otherwise have; but the Tribe shall not be liable for the debts or obligations of the Authority.

. . .

24 CFR Sec. 804.204 states in pertinent



part as follows:

"Indian preference in contracting.

(a) Preference in the Award of Contracts. (1) An IHA shall to the greatest extent feasible under this part give preference to the award of contracts in connection with a Project to Indian Organizations and Indian-Owned economic enterprises...."

Rule 12(b)1 and (2) of the Arizona Rules of Civil Procedure, Vol. 16 A.R.S. provide in pertinent part:

Rule 12(b) 1:

"...The following defenses may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter.

(2) Lack of jurisdiction over the person."

. . .

Article XX, Section 4 of the Arizona Constitution provides in pertinent part:

"Fourth. Public Lands; Indian lands.

Fourth. The people inhabiting this state do agree and declare



that they forever disclaim all right and title to...all lands... owned or held by any Indian or Indian tribes...and...the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States."

Section 1.1(b) and (3), Civil and Criminal Law and Order Code, Pascua Yaqui Tribe provide in pertinent part as follows:

"Sec. 1.1 - Jurisdiction Over Persons.

...(b) Any person who enters upon the Pascua Yaqui Reservation shall be deemed to have impliedly consented to the jurisdiction of the Tribal Court....

(e) Any person entering within the boundaries of this Reservation becomes subject to the laws and regulations of the Reservation."

Section 2.1 thereof states in pertinent part:

"The Pascua Yaqui Tribal Court shall have jurisdiction of all suits wherein the defendant is a member of the Tribe and between members and non-members which are brought before the Court, provided that the Tribal Court shall not have jurisdiction over non-Indian defen-

dants in civil matters, unless said non-Indian shall have submitted himself to said jurisdiction...."

STATEMENT OF THE CASE

This case was originated by the Respondents real parties in interest, Mandan, Inc. and TBI General Contractors, Ltd., d/b/a Mandan-TBI Joint Venture, an Indian contractor given preference for contracting pursuant to the terms of 24 CFR Sec. 805.204.

Mandan-TBI Joint Venture was the general contractor who contracted with the Petitioner, the Pascua Yaqui Housing Authority (PYHA) for the purposes of the construction of 60 housing units on the Pascua Yaqui Indian Reservation. The project was funded by the Department of Housing and Urban Development (HUD), as Low Income Housing in compliance with HUD regulations codified in Title 24 of the Code of Federal Regulations (24 CFR Sec. 805.101 et seq.



The Respondent general contractor filed suit in Arizona state court (R.1-Ex.A) against the Petitioner PYHA, a creation of the Pascua Yaqui Indian Tribe, created pursuant to HUD regulations, 24 CFR Sec. 805.101 et seq. The construction involved among other aspects, the general contractor Respondent utilizing Respondent MTV General Contractors, Inc. as a subcontractor for certain work involving the importation, spreading and compaction of fill dirt for the housing pads and other areas subject to the contract to be performed on the Reservation, out of which work the contractual dispute arose. The amount in controversy is an amount in excess of \$100,000.00 out of the \$3 Million contract.

The Petitioner herein raised the question of personal and subject matter jurisdiction concerning the claim raised by the Respondents real parties in interest at the trial court level in its Motion to Dismiss

(R.1-Ex.C) under Rules 12(b)1 and 12(b)2 of the Arizona Rules of Civil Procedure, which are modeled after the Federal Rules of Civil Procedure. The Memorandum of Points and Authorities accompanying the Motion included as support for the Motion the citation of 24 CFR Secs. 805.101 et seq and discussed the provisions of 25 USC Sec. 1300f(c). Additionally cited were the cases of Bryan v. Itasca County, 426 U.S. 373, 48 L.Ed.2d 710, 96 S.Ct. 2102 (1976); Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959); McClannahan v. Arizona State Tax Comm., 36 L.Ed.2d 129, 93 S.Ct. 125 (1973); San Carlos Apache Tribe v. State of Arizona, 668 F.2d 1093, (9th Cir. 1982); and White Mountain Apache Indian Tribe v. Shelley, 107 Ariz. 4, 480 P.2d 654 (1971). Additional state and federal authorities were cited in support of the arguments raised in the said Motion, including Article XX, Section 4 of

the Arizona Constitution and Arizona appellate court decisions dealing with the provisions thereof.

The Respondents real parties in interest filed an Opposition to the Motion to Dismiss, to which the Petitioner filed a Reply Memorandum (R.1-Ex.E) which cited the cases of Hubert Const. v. Seminole Tribal Housing 490 F.Supp. 1008 (1980) and Hickey v. Crow Creek Housing Authority, 379 F.Supp. 1002 (1974) for the proposition that the Federal courts have found, in similar cases, that there was no subject matter jurisdiction, Tribal Court remedies had to be exhausted, and the sue or be sued clause in the HUD regulations required suit in Tribal Court. Additionally, the Civil and Criminal Law and Order Code of the Pascua Yaqui Tribe was cited to the Court for the proposition that this dispute should be handled in the Pascua Yaqui Tribal Court. Finally, appended to the Reply Memorandum (R.1-Ex.E) at the trial



court level were two opinions from the Office of the Solicitor of the Department of Interior wherein Department of Interior counsel in the Office of the Solicitor briefed the United States Attorney for Arizona, A. Melvin McDonald, and the Arizona Attorney General's Office on why it was that the State of Arizona could not exercise criminal or civil jurisdiction over the Pascua Yaqui Reservation, notwithstanding the provisions of 25 USC 1300f.

The Office of the Solicitor based its opinions on state and federal authorities including Washington v. Yakima Indian Nation, 439 U.S. 463 (1979) as well as recent Ninth Circuit Court of Appeals' decisions decided thereunder.

Upon the lower court's denial of the Motion to Dismiss (R.1-Ex.6) the Petitioner herein filed its Petition for Special Action (R.1) (extraordinary writ) in the nature of a request for a writ of prohibi-

tion against the trial court judge preventing him from exercising jurisdiction with respect to the Petitioner. In the Petition for Special Action, the points raised below and at the trial court level were reiterated. Additionally, the Petitioner pointed out that the Ninth Circuit Court of Appeals had recently dismissed such a claim involving a very similar factual situation relating to an Indian Housing Authority's dispute with a contractor in R.J. Williams Co. v. Ft. Belknap Housing Authority, 719 F.2d 979 (9th Cir. 1983). A recent Proclamation of the Governor of the State of Arizona disclaiming civil and criminal jurisdiction over Indian lands was also presented upon the Special Action proceedings. The Court of Appeals, Division Two in the State of Arizona dismissed the Petition for Special Action (R.6) and the Petitioner herein petitioned for review (R.8) of that decision by the Arizona Court of Appeals

to the Arizona Supreme Court, but the Petition for Review was denied (R.12) by Arizona's highest court, which refused to prohibit the trial court from exercising jurisdiction. It is from this decision of the Arizona Supreme Court that this Petition for Writ of Certiorari arises.

REASONS FOR GRANTING THE WRIT

The questions presented here relating to Tribal self-government deal with substantial case precedent and affect the actions of Indian Tribes and those dealing with them across the United States. The Petitioner herein seeks review by this Court in order to reinforce Tribal self-government in the form of Tribal Court adjudications of disputes arising out of activities conducted upon the reservation.

The Arizona Supreme Court, and the lower courts which have reviewed this matter, have failed to provide for appropriate Tribal Court jurisdiction over the subject case,

which failure is in conflict with applicable federal court authority applying in Arizona in the form of R.J. Williams Const. v. Ft. Belknap Housing Authority, 719 F.2d 979 (9th Cir, 1983) which deals specifically with a construction dispute involving a contractor and an Indian Housing Authority, wherein that court concludes that such disputes should be resolved by the Tribal Court where it determines to assert jurisdiction over such matters. The holding of the Ninth Circuit Court of Appeals is in keeping with the controlling case precedents decided by this Court. See, Washington v. Yakima Indian Nation, 439 U.S. 463 (1979); Bryan v. Itasca County, 426 U.S. 373, 48 L.Ed.2d 710, 96 S.Ct. 2102 (1976); Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959); and McClannahan v. Arizona State Tax Comm., 36 L.Ed.2d 129, 93 S.Ct. 125 (1973).

The Arizona courts' determination in this

case are also at variance with the rulings of Hubert Const. v. Seminole Tribal Housing, 490 F.Supp. 1008 (1980) and Hickey v. Crow Creek Housing Authority, 379 F. Supp. 1002 (1974).

The questions presented in this case have not been directly decided by this Court. The Indian Tribes of the United States must have tribal self-government. Their development of extensive housing on their reservations gives rise to legal disputes. They, and those with whom they deal must have an authoritative answer to the question of whether Indian tribal courts will be allowed the responsibility of exercising jurisdiction over construction claims arising on the reservations.

If this Court does not grant Certiorari in this case, the Petitioner herein will be forced to undergo a state court trial, where jurisdiction vests rightfully with the Pascua Yaqui Tribal Court to decide

a dispute between this Indian Housing Authority and its Indian contractor.

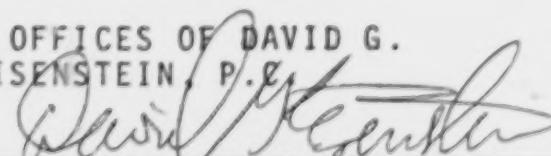
CONCLUSION

Based upon the foregoing authorities and points, this Court has been presented with questions relating to Tribal self-government. These questions are nation-wide in scope and large in monetary consequence. An authoritative decision from this Court is necessary. This Petition for a Writ of Certiorari should be granted.

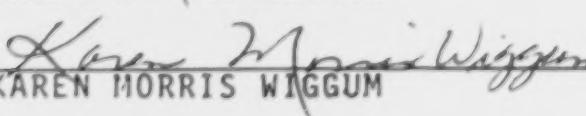
RESPECTFULLY SUBMITTED.

LAW OFFICES OF DAVID G.
EISENSTEIN, P.C.

BY:


DAVID G. EISENSTEIN

BY:


KAREN MORRIS WIGGUM

Attorneys for Petitioner

APPENDIX A



ARIZONA SUPERIOR COURT
PIMA COUNTY

JAMES C. CARRUTH
Judge

NO. 210510

DATE: 22 Dec., 1983

TBI GENERAL CONTRACTORS,
LTD., et al,

Plaintiff,

Plaintiff's Atty.

PASCUA YAQUI HOUSING
AUTHORITY,

Defendant.

Defendant's Atty.

MINUTE ENTRY

UNDER ADVISEMENT RULING ON DEFENDANT'S MOTION
TO DISMISS:

Having considered the matter, the Court is of the opinion that defendant has been empowered to consent to this Court's jurisdiction, and that plaintiffs having correctly demonstrated that defendant has expressly and by implication waived any claim of

immunity from suit which it might otherwise enjoy.

IT IS ORDERED that the motion to dismiss is denied.

cc:

Court Administrator
Under Advisement Clerk
D. Kim Lough, Esq., 800 Az. Title Bldg.,
111 W. Monroe, Phoenix 85003
David G. Eisenstein, Esq.
Hon. James C. Carruth

Cyndi Copeland
Deputy Clerk.

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

PASCUA YAQUI HOUSING }
AUTHORITY, }
Petitioner, } 2 CA-SA 0025

vs. } ORDER

SUPERIOR COURT OF THE }
STATE OF ARIZONA, in }
and for the County of }
Pima; the Honorable }
James C. Carruth; and }
the following real } (Pima County
parties in interest: } Superior Court
TBI GENERAL CONTRAC- } Cause No. 210510)
TORS, LTD., an }
Arizona corporation, }
and MANDAN, INC., an }
Arizona corporation, }
collectively, dba }
MANDAN-TBI JOINT }
VENTURE, and MTV }
GENERAL CONTRACTORS, }
INC., an Arizona }
corporation, }
Respondents. }

The Court declines to accept jurisdiction,
and it is

ORDERED that the above-entitled Petition for
Special Action is DISMISSED.

IT IS FURTHER ORDERED that Motion to Strike
or in the Alternative Motion for Leave to File
Supplemental Pleadings is DENIED.

Dated: February 17, 1984.

/s/ Ben C. Birdsall
BEN C. BIRDSALL
Chief Judge

Copy to:

David G. Eisenstein, P.C.
695 W. Ajo Way
Tucson, Az. 85713

Curtis A. Jennings, Esq.
Jennings, Kepner & Haug
800 Arizona Title Bldg.
111 W. Monroe St.
Phoenix, Az. 85003

Hon. James C. Carruth, Judge
Pima County Superior Court, Div. 5
Tucson, Az. 85701 (true copy)

James N. Corbett, Clerk
Pima County Superior Court
Tucson, Az. 85701 (certified copy)

Pima County Courts Coordinator
111 W. Congress St.
Tucson, Az. 85701



SUPREME COURT
State of Arizona
201 - WEST WING
Capitol Building
(602) 255-4536
Phoenix 85007

S. Alan Cook
Clerk

Diana K. Bentley
Chief Deputy
Clerk

April 25, 1984

RE: PASCUA YAQUI HOUSING AUTHORITY vs.
SUPERIOR COURT/TBI GENERAL
CONTRACTORS, LTD., et al
Supreme Court No. 17491-PR
Court of Appeals No. 2 CA-SA 0025
Pima County No. 210510

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 24, 1984, in regard to the above-entitled cause:

"ORDERED: Petition for Review-DENIED."

Record returned to the Court of Appeals, Division Two, Tucson, this 25th day of April, 1984.

S. ALAN COOK, Clerk

TO: David G. Eisenstein, Esq. Law Offices
of David G. Eisenstein
Curtis Jennings, Esq., Jennings,
Kepner & Haug
Elizabeth Urwin Fritz, Clerk,
Court of Appeals, Division Two

eh

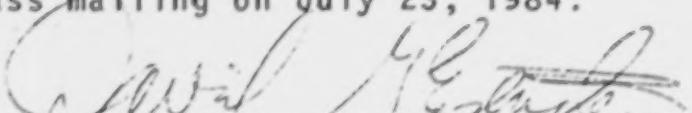
CERTIFICATE OF SERVICE

I, DAVID G. EISENSTEIN, certify that all parties required by these rules to be served with this Writ of Certiorari namely:

Honorable James C. Carruth
Superior Court Judge
111 West Congress Street
Tucson, Arizona 85701

D. Kim Lough
Attorney for Respondents
Real Parties in Interest
JENNINGS, KEPNER & HAUG
800 Arizona Title Bldg.
111 West Monroe Street
Phoenix, Arizona 85003

Service was implemented pursuant to Sup. Ct. Rule 28.3 and 28.5(b) by first class mailing on July 23, 1984.


DAVID G. EISENSTEIN